THE FAILURE OF THE "TILDEN TRUST."

MELANCHOLY the spectacle must always be, when covetous relatives seek to convert to their own use the fortune which a testator has plainly devoted to a great public benefaction. But society is powerless, in a given case, so long as the forms of law are observed. When, however, charitable bequests have been repeatedly defeated, under cover of law, and that, too, although the beneficent purpose of the testator was unmistakably expressed in a will executed with all due formalities, and although the designated trustees were ready and anxious to perform the trust reposed in them, one cannot help wondering if there is not something wrong in a system of law which permits this deplorable disappointment of the testator's will and the consequent loss to the community. The prominence of the testator, and the magnitude of the "Tilden Trust," which has recently miscarried, have aroused so general an interest that this seems a peculiarly fit time to consider the legal reasons for the failure of that and similar charitable bequests in New York.

Governor Tilden's will is summarized by the majority of the court in Tilden *v.* Green,[1] as follows: "I request you [the executors] to cause to be incorporated an institution to be called the 'Tilden Trust,' with capacity to maintain a free library and reading-room in the city of New York, and such other educational and scientific objects as you shall designate; and if you deem it expedient — that is, if you think it advisable and the fit and proper thing to do — convey to that institution all or such part of my residuary estate as you choose; and if you do not think that course advisable, then apply it to such charitable, educational, and scientific purposes as, in your judgment, will most substantially benefit mankind."[2] The trustees procured the incor-

[1] 28 N. E. R. 880, 887.

[2] The writer is by no means convinced that this was a just interpretation of the will, but for the purposes of this article its accuracy is assumed.

poration of the "Tilden Trust," and elected to convey the entire residue to that institution. An admirable will and willing trustees — and yet the bequest was not sustained. If the trustees had not elected to give the property to the "Tilden Trust," that institution would have had no claim, nor would there have been, under the law of New York, any means of compelling them to apply it to the alternative charitable purposes. Therefore, the Court of Appeals decided, the trustees could not dispose of the property in either of the two modes indicated in the will, and the entire residue, amounting to some $5,000,000, must be distributed among the heirs and next of kin.

The question of the proper interpretation of the will apart, the failure of the "Tilden Trust" is due to a combination of two causes: the one legislative, the other judicial. Had the Tilden case arisen in England, or in any of our States, except New York, Michigan,[1] Minnesota,[2] Maryland,[3] Virginia,[4] and West Virginia,[5] the trust would have been established. The precise nature of the legislation in New York will be best appreciated by contrasting a private trust with a charitable trust.

A trust, being an obligation of one person to deal with a specific *res* for the benefit of another, cannot be enforced unless there is a definite obligee, that is, a *cestui que trust*, who can file a bill for its specific performance. Furthermore, as equity follows the law, the rule of perpetuities must apply to trusts as well as to legal estates. By the English and general American law, neither of these doctrines, which are of universal application to private trusts, is extended to charitable trusts. On the one hand, the considerations of public policy, which lie at the foundation of the rule of perpetuities in the case of private property, are obviously inapplicable to property devoted to charity; and, on the other, the specific performance of the charitable trust is abundantly secured through the attorney-general acting in behalf of the State.

In New York, however, the English law of charitable trusts has been abolished by statute, and charitable trusts are thereby put

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[1] Methodist Church *v.* Clark, 41 Mich. 730.
[2] Little *v.* Willford, 31 Minn. 173.
[3] Gambel *v.* Trippe (Md. 1892) 23 Atl. R. 461.
[4] Stonestreet *v.* Doyle, 75 Va. 356.
[5] Bible Society *v.* Pendleton, 7 W. Va. 79.

upon the same footing as private trusts, with the single exception that property may be given directly to corporations authorized to receive and hold permanently bequests for specified charitable purposes. This exceptional New York legislation seems to the writer an unmixed evil. Any one, who follows the reported cases, to say nothing of the unreported instances, for the last fifty years, will be startled at the number of testators whose reasonable wishes have been needlessly disappointed, and at the amount of property which has been diverted from the community at large for the benefit of unscrupulous relatives.[1]

Nor has New York, whose legislation in general has been widely copied, made any recent converts to her doctrine of charities. On the contrary, Wisconsin, which at one time followed the New York rule, by the revision of 1878 adopted the English practice with the exception of the so-called *cy-près* doctrine. Virginia, too, which at one time ignored the distinction between private and charitable trusts, has, by statute, sanctioned to a limited extent indefinite charitable trusts.

But even under the New York statutes, Governor Tilden's charitable purposes, it would seem, might have been accomplished within the rules applicable to private trusts. The objection of remoteness did not exist, for the will was carefully framed so as not to violate the rule of perpetuities; and the objection that there was no definite *cestui que trust* who could compel its performance was obviated by the willingness of the trustees to exercise their option in favor of the "Tilden Trust." Unfortunately, however, the New York courts had adopted a chancery doctrine, which was first stated in Morice *v.* Bishop of Durham.[2] In that case property was bequeathed to the bishop upon trust to dispose of the same to such objects of benevolence and liberality as he should most approve of. This was obviously not a charitable trust, and, there being no *cestui que trust*, there was no one who could compel its performance. The bishop, however, disclaimed any beneficial interest in himself and was ready,

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[1] Owens *v.* Missionary Society, 14 N. Y. 380; Downing *v.* Marshall, 23 N. Y. 366; Levy *v.* Levy, 33 N. Y. 97; Bascom *v.* Albertson, 34 N. Y., 584; Adams *v.* Perry, 43 N. Y. 487; White *v.* Howard, 46 N. Y. 144; Holmes *v.* Mead, 52 N. Y. 332; Prichard *v.* Thompson, 95 N. Y. 76; Cottmar *v.* Grace, 112 N. Y. 299; Read *v.* Williams, 125 N. Y. 560; Fosdick *v.* Hempstead, 125 N. Y. 581; Tilden *v.* Green, 28 N. E. R. 880.

[2] 9 Ves. 399, 10 Ves. 521.

like the trustees in the "Tilden Trust," to apply the property in accordance with the testator's will. But the Master of the Rolls and the Lord Chancellor decided that the trust must fail, and decreed in favor of the next of kin.

One who dissents from a decision of Sir William Grant, affirmed by Lord Eldon, which has remained unchallenged for nearly ninety years, and which has been followed in many later decisions,[1] must realize that he is leading a forlorn hope. Nevertheless the writer, finding himself unable to agree with the conclusion in Morice *v.* Bishop of Durham, ventures to give the reasons for his faith.

It will be granted at the outset that the decision in this case defeated the will of the testator, and that nothing short of an imperative rule of law can ever justify such a result. It is also certain that no such rule of law is mentioned by Lord Eldon. The distinguished chancellor, after saying that the bishop could not hold for his own benefit, disposes of the bishop's willingness to perform the trust in this short and unsatisfactory fashion: "I do not advert to what appears upon the record of his intention to the contrary, and his disposition to make the application; for I must look only to the will, without any bias from the nature of the disposition, or the temper and quality of the person who is to execute the trust." Sir William Grant seems to have thought that the right of the next of kin resulted from an intestacy as to the beneficial interest.[2] But the fallacy of this view is demonstrable with almost mathematical conclusiveness. An intestacy, where everything that the testator had passes by his will, is a self-evident contradiction. And yet in Morice *v.* Bishop of Durham all the testator's property did pass by his will to the bishop. If it be said that the legal title passed, but not the equitable interest, the answer is that the absolute owner of property has no equitable

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[1] James *v.* Allen, 3 Mer. 17 (*semble*); Ommaney *v.* Butcher, T. & R. 260; Fowler *v.* Garlike, 1 Russ & M. 232; Williams *v.* Kershaw, 5 Cl. & F. 111 (*semble*); Harris *v.* Du Pasquier, 26 L. T. Rep. 689; Leavers *v.* Clayton, 8 Ch. D. 589; Adye *v.* Smith, 44 Conn. 60; Chamberlain *v.* Stearns, 111 Mass. 267; Nichols *v.* Allen, 130 Mass. 211. But see Goodale *v.* Mooney, 60 N. H. 528.

[2] "If there be a clear trust, but for uncertain objects, the property that is the subject of the trust, is undisposed of; and the benefit of such trust must result to those to whom the law gives the ownership in default of disposition by the former owner." 9 Ves. 399. See, to same effect, Levy *v.* Levy, 33 N. Y. 97, 102 per Wright, J., and Holland *v.* Alcock, 108 N. Y. 312, 323 per Rapallo, J.

interest. The use of the words "equitable ownership" and "equitable estate" is so inveterate among lawyers that we do not always remember that these are figurative rather than exact legal terms. An equitable interest is a right *in personam.* It implies, of necessity, a relation between two persons, known as the trustee and the *cestui qui trust.* In the case of absolute ownership who is the trustee? An equitable claim by the owner against himself as the holder of the legal title would be an absurdity. Test the matter in another way. Transfer by intestacy is a true succession. The right of the successor is of precisely the same nature as that of his predecessor. The right of the next of kin, as established by Lord Eldon, was a genuine equitable interest. The next of kin were *cestuis que trustent,* the bishop was trustee. In other words, the next of kin had a claim against the person of the bishop. But the testator never had any right against the bishop. How, then, any intestacy?

Lord Eldon and Sir William Grant, futhermore, relied greatly upon the case of Brown *v.* Yeall,[1] where the trust was void as a perpetuity, and their reliance upon this case warrants the belief that the case before them was assimilated, somewhat inconsiderately, to a distinct class of cases, where decrees in favor of the testator's heir or next of kin are eminently just. And this leads us to a consideration of the true principle by which courts of equity dispose of the beneficial interest in property where an intended trust necessarily fails.

If property is conveyed upon trust, and, by some oversight, no beneficiary is designated, or if the beneficiary named is non-existent, or incapable of identification by the trustee, or refuses the gift, or if the trust is for an illegal purpose, the trust must, in the nature of things, fail.

The *res,* which is the subject-matter of the trust, vests, nevertheless, in the trustee. The courts might, conceivably, as Lord Eldon suggested in Morice *v.* Bishop of Durham, have allowed the trustee to hold the *res* for his own benefit, discharged of any trust. In fact, however, they have compelled him to hold the property as a trustee for the creator of the express trust, if he is still living, or for his representative, if he is dead. This equitable right, as we

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[1] 7 Ves. 50 n.

have seen, does not come to the heir or next of kin as an intestate succession. The trust comes into being only after the death of the testator. Being the creation of the courts of equity it is a constructive or *quasi* trust, and founded, like all constructive trusts, upon natural justice. The trustee was plainly not intended to take the property for himself; he ought to hold it for some one; and no one, it is obvious, is, in general, so well entitled to the beneficial interest as the creator of the trust or his representative.[1]

If, however, as in Morice *v.* Bishop of Durham, and the "Tilden Trust," the performance of the express trust is not impossible nor illegal, even though there is no specific *cestui que trust* named who can compel its performance, the trust does not of necessity fail. Whether it shall fail or not in a given case must depend on the will of the trustee. If the trustee refuses to perform, as there is no one to compel performance, the trust fails, and the trustee, as in the other cases of impossibility and for the same reasons, will be held as a constructive trustee for the creator of the trust or his representative. If, however, the trustee is willing to perform the trust, these reasons lose all their force.

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[1] Sometimes natural justice dictates a different disposition of the beneficial interest; *e.g.*, property is devised upon trust to distribute the same among members of a class, with full discretion as to the proportions and the individuals within the class. The trustee for some reason fails to distribute. The express trust, then, cannot be performed. The trustee, however, as before, ought not to keep the property for himself. But here it is much more consonant with natural justice to create a constructive trust for the equal benefit of all the members of the class than to give it to the testator's representative. Where the class is defined as "relatives," the trustee may, of course, select any relatives, however distant. But, if he makes no selection, an equal distribution among all kinsmen, near and remote, would commonly be impracticable. Equity, therefore, goes a step further and limits the equal distribution to those who would be entitled under the statute of distributions. This solution is doubtless in accordance with the general sense of justice. Huling *v.* Fenner, 9 R. I. 412. The common explanation of these cases, that there is a gift which vests in the class subject to be divested by the exercise of the trustee's discretion in favor of some one or more of the class, seems to be artificial and unsupported by the facts.

Again, if property is bequeathed to a trustee for such charitable purposes as he shall designate, and the trustee names none, the express trust cannot be carried out. Equity, however, will treat this as a constructive trust for general charity and frame a scheme. And this disposition of the property, as every one will admit, is a nearer approximation to the testator's probable intention, and therefore more just than to create a constructive trust for his representative. Minot *v.* Baker, 147 Mass. 348, and cases cited.

In the one case, where the will of the testator *cannot* be carried out, equity, by interfering, prevents the unjust enrichment of the trustee at the expense of others better entitled.

In the other case, where the will of the testator *can* be fulfilled, equity, by interfering, defeats his will and thus produces the unjust enrichment of the testator's representative at the expense of the intended beneficiary.

In the one case, the impossibility of performing the express trust gives rise to an equitable constructive trust. In the other case, an inequitable constructive trust is what causes the impossibility of performing the express trust. Surely a strange perversion.

It may be said that there can be no trust without a definite *cestui que trust.* This must be admitted. If, for instance, property is given to A upon trust to convey to such person as he shall think deserving, and A either refuses to convey to any one, or conveys to B as a deserving person, there is, properly speaking, no express trust here. In the one alternative the express trust fails ; in the other alternative B gets the legal estate. But it does not follow from this admission that such a gift is void. Even though there be no express trust, there is a plain duty imposed upon A to act, and his act runs counter to no principle of public policy. Why then seek to nullify his act? The only objection that has ever been urged against such a gift is that the court cannot compel A to act if he is unwilling. Is it not a monstrous *non sequitur* to say that therefore the court will not permit him to act when he is willing?

It may be objected that a devise might in this way become "the mere equivalent of a general power of attorney;" but this objection seems purely rhetorical. Suppose a testator to give A a purely optional power of appointment in favor of any person in the world except himself, with a provision that in default of the exercise of the power the property shall go to the testator's representatives, — or this provision may be omitted altogether, the effect being the same. Such a will is obviously nothing if not the mere equivalent of a general power of attorney. And yet the validity of this power would be unquestioned. If the power is exercised, the appointee takes. If it is not exercised, the testator's representative takes.

Now vary the case by supposing that the testator imposes upon the donee of the power the *duty* to exercise it. Can the imposition of this duty furnish any reason for a different result? In fact, A, the donee of the power, has in this case also the option of appointing or not, since, although he ought to appoint, no one can compel him to do so. Does it not seem a mockery of legal reasoning to say that the court will sanction the exercise of the power where the donee was under no moral obligation to act at all, but will not sanction the appointment when the donee was in honor bound to make it?

It is time enough for the court to interfere when A proves false to his duty and sets up for himself. Then, indeed, a court of equity ought to turn him into a constructive trustee for the donor or his representative. This contingent right of the heir or next of kin may be safely trusted to secure the performance of his duty by the trustee. And its existence is a full answer to the suggestion of Sir William Grant in Morice *v.* Bishop of Durham and of Mr. Justice Rapallo in Holland *v.* Alcock,[1] that the trustee could keep the property without accountability to any one, if the beneficial interest were not given unconditionally to the heir or next of kin immediately upon the testator's death. The position of the heir or next of kin is, in substance, the same as in cases where property is given to them subject to a purely optional power of appointment in another to be exercised, if at all, within a reasonable time. Sir William Grant himself said, in Gibbs *v.* Rumsey,[2] which was such a case: "The claim of the heir or next of kin is premature until it shall be seen whether any appointment will be made."

We may appeal from Mr. Justice Rapallo in Holland *v.* Alcock to the opinion of the same distinguished judge in Gilman *v.* McArdle.[3] In each of these cases there was a trust for the same indefinite object, namely, the celebration of masses for the soul of the creator of the trust. In the former case the trust was expressed in a will, in the other case the trust was annexed to a conveyance *inter vivos*. In neither case was there any mode of compelling the specific performance of the trust. And yet the court would not allow the trustee under the will to perform the trust, but compelled him to surrender the trust property to

[1] 108 N. Y. 323. [2] 2 V. & B. 299. [3] 99 N. Y. 451.

the testator's representative; whereas the same court refused to prevent the trustee under the conveyance *inter vivos* from performing the trust, and decided that the right of the grantor's representative to the trust property was contingent upon the refusal of the trustee to perform the trust. The distinction was said to result from the fact that there was a contract in Gilman *v.* McArdle. But what difference could the contract make beyond giving a right to sue at law for damages upon its breach? The duty to perform the trust was as cogent upon the trustee under the will as upon the trustee under the conveyance. In each case, and for the same reasons, the breach of that duty would give rise to an equitable obligation against the trustee to surrender the property which had been given to him upon confidence that he would perform the trust. And in neither case is there any assignable reason for creating this equitable obligation before any default in the trustee.

Although Morice *v.* Bishop of Durham has never been directly impeached, either in England or this country, there are several groups of cases, undistinguishable from it in principle, in which the equity judges have declined to interfere, at the suit of the next of kin, to prevent the performance of a purely honorary trust.

Mussett *v.* Bingle [1] is one illustration. The testator bequeathed £300 upon trust for the erection of a monument to his wife's first husband. It was objected that the trust was purely honorary; that is, that there was no beneficiary to compel its performance. But the trustee being willing to perform, Hall, V.C., sustained the bequest. In the similiar case of Trimmer *v.* Danby,[2] Kindersley, V.C., said: "I do not suppose that there would be any one who could compel the executors to carry out this bequest and raise the monument; but if . . . the trustees [*i.e.*, the executors] insist upon the trust being executed, my opinion is that this court is bound to see it carried out." There are many American decisions to the same effect.[3]

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[1] W. N. [1876] 170.

[2] 25 L. J. Ch. 424. See, further, Masters *v.* Masters, 1 P. Wms. 423; Mellick *v.* Asylum, Jacob, 180; Limbrey *v.* Gurr, 6 Mad. 151; Adnam *v.* Cole, 6 Beav. 353.

[3] Gilmer *v.* Gilmer, 42 Ala. 9; Johnson *v.* Holifield, 79 Ala. 423, 424; Cleland *v.* Waters, 19 Ga. 35, 54, 61; Detwiller *v.* Hartman, 37 N. J. Eq. 347 (a $40,000 monu-

Gott *v.* Nairne[1] is another case at variance with Morice *v.* Bishop of Durham. In that case £12,000 were bequeathed to trustees, on trust at their discretion to buy an advowson and nominate to it such person as they should think proper. Subject to this trust, the advowson was to be held in trust for A until he should have a benefice worth £1,000 a year, or died. Until the advowson was bought the fund was to accumulate, and at the end of twenty-one years, or at A's death, or on his being presented to a benefice worth £1,000 a year, the fund was to belong to A, his executors and administrators, absolutely. The fund accumulated for twelve years. No advowson had been purchased, but the trustees did not desire to renounce the trust. Under the English rule, which gives a *cestui que trust*, who has the entire beneficial interest in property, the right to have a conveyance of the legal title, A claimed to have the fund transferred to him. The bill was dismissed on the ground that A had not the exclusive interest; for the trustees, though not compellable, were yet at liberty to nominate some person other than A. Hall, V.C., after remarking that the trustees disclaimed any beneficial interest and desired to perform the trust, added: "I see no reason why the trustees should not be allowed to carry out this trust."

A bequest for the celebration of masses for the soul of a deceased person is, in Ireland,[2] an honorary trust. No one can file a bill to compel its performance. But if the trustee is willing to comply with the testator's direction, the next of kin cannot interfere to prevent him.[3]

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ment); Wood *v.* Vandenburgh, 6 Paige, 277; Emans *v.* Hickman, 12 Hun, 425; Re Frazer, 92 N. Y. 239; Hagenmeyer *v.* Hanselman, 2 Dem. 87, 88 (but see Re Fisher, 8 N. Y. Sup. 10); Bainbridge's App., 97 Pa. 482; Fite *v.* Beasley, 12 Lea, 328; Cannon *v.* Apperson, 14 Lea, 553, 590.

[1] 3 Ch. D. 278, 35 L. T. Rep. 209 s. c.

[2] In Massachusetts and Pennsylvania a bequest for masses is a good charitable trust. Schouler's Pet., 134 Mass. 426; Seibert's Ap., 18 W. N. (Pa.) 276. In England such a bequest is void, as a superstitious use. West *v.* Shuttleworth, 2 M. & K. 684; Re Fleetwood, 15 Ch. D. 596; Elliott *v.* Elliott, 35 Sol. J. 206.

[3] Commissioners *v.* Wybrants, 7 Ir. Eq. 34, n.; Read *v.* Hodgens, 7 Ir. Eq. 17; Brennan *v.* Brennan, Ir. R. 2 Eq. 321; Dillon *v.* Rielly, Ir. R. 10 Eq. 152; Atty.-Gen. *v.* Delaney, Ir. R. 10 C. L. 104; Bradshaw *v.* Jackman, 21 L. R. Ir. 12; Reichenbach *v.* Quin, 21 L. R. Ir. 138; Perry *v.* Tuomey, 21 L. R. Ir. 480. The Court of Appeals has consistently

The most conspicuous illustration of the doctrine which is here advocated is to be found in the recent English case of Cooper-Dean *v.* Stevens.[1] There was in this case a bequest of £750 for the maintenance of the testator's horses and dogs. It was urged by the residuary legatee, on the authority of Morice *v.* Bishop of Durham, that this trust must fail, although the trustees desired to perform it. But the trust was upheld. North, V.C., disposed of the plaintiff's argument as follows: "It is said that the provision made by the testator in favor of his horses and dogs is not valid; because (for this is the principal ground upon which it is put) neither a horse or dog could enforce the trust; and there is no person who could enforce it, . . . and that the court will not recognize a trust unless it is capable of being enforced by some one. I do not assent to that view. There is no doubt that a man may, if he pleases, give a legacy to trustees, upon trust to apply it in erecting a monument to himself, either in a church, or in a churchyard, or even in unconsecrated ground, and I am not aware that such a trust is in any way invalid; although it is difficult to say who would be the *cestui que trust* of the monument. In the same way, I know of nothing to prevent a gift of a sum of money to trustees, upon trust to apply it for the repair of such a monument. In my opinion, such a trust would be good, although the testator must be careful to limit the time for which it is to last, because, as it is not a charitable trust, unless it is to come to an end within the limits fixed by the rule against perpetuities it would be illegal. But a trust to lay out a certain sum in building a monument . . . is, in my opinion, a perfectly good trust, although I do not see who could ask the court to enforce it. If persons beneficially interested in the estate could do so, then the present plaintiff can do so; but if such persons could not enforce the trust, still it cannot be said that the trust must fail because there is no one who can actively

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maintained the opposite view in Holland *v.* Alcock, 108 N. Y. 312; O'Connor *v.* Gifford, 117 N. Y. 275, 280. (But see Hagenmeyer *v.* Hanselman, 2 Dem. 87. Even in New York a gift *inter vivos* for the celebration of masses for the soul of the donor is valid. Gilman *v.* McArdle, 99 N. Y. 451.)

[1] 41 Ch. D. 552.

enforce it. Is there anything illegal or obnoxious to the law in the nature of the provision — that is, in the fact that it is not for human beings, but for horses and dogs?" The vice-chancellor answered this question in the negative, and added, "There is nothing, therefore, in my opinion, to make the provision for the testator's horses and dogs void."[1] The learned reader will observe the care with which the distinction is drawn between trusts for a legal purpose and trusts for illegal purposes — the precise distinction which Lord Eldon seems to have overlooked in Morice *v.* Bishop of Durham.

This distinction between an illegal trust and a valid, though merely honorary, trust is well brought out by some decisions in the Southern States before the war. A bequest upon trust to emancipate a slave in a slave State was void, it being against public policy to encourage the presence of free negroes in a slave-holding community. But a bequest upon trust to remove a slave into a free State and there emancipate him was not obnoxious to public policy, and although the slave could not compel the trustee to act in his behalf, still the courts acknowledged the right of a willing trustee to give the slave his freedom in a free State.[2] The reasoning of the courts is similar to that already quoted. Rice, C.J., for example, in Hooper *v.* Hooper[3] says: "The Court of Chancery will recognize the *authority* of the executor to execute the trust. . . . But the slave cannot enforce its execution by suit. . . . The trust is one of that class which may be valid, and yet not capable of being enforced against the trustee by judicial tribunals." So in Cleland *v.* Waters,[4] per Starnes, J.: "At all events, if the executors do send him out of the country, no one can gainsay him. . . . Where there is

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[1] See to the same effect Mitford *v.* Reynolds, 16 Sim. 105; Fable *v.* Brown, 2 Hill, Ch. 378, 382; Skrine *v.* Walker, 3 Rich. Eq. 262, 269.

[2] Hooper *v.* Hooper, 32 Ala. 669; Sibley *v.* Marian, 2 Fla. 553; Cleland *v.* Waters, 19 Ga. 35; Ross *v.* Vertner, 6 Miss. 305; Thompson *v.* Newlin, 6 Ired. 380, 8 Ired. 32; Frazier *v.* Frazier, 2 Hill, Ch. (S. C.), 304; Henry *v.* Hogan, 4 Humph. 208; Purvis *v.* Shannon, 12 Tex. 140; Armstrong *v.* Jowell, 12 Tex. 58; Elder *v.* Elder, 4 Lehigh, 252.

[3] 32 Ala. 669, 673.

[4] 19 Ga. 35, 61.

no municipal law forbidding it, the testator can certainly make such a law for himself in his will, and the same reason exists why the executor should carry it into effect as why he should erect a monument or tombstone if so directed by the testator's will. It will not be disputed . . . that it would be the duty of the executor to carry such direction into effect, and that he would be sustained by a court of justice in so doing. . . . Yet it could not be said that the tombstone had any right in the premises, or perhaps that any remedy lay against the executors, by which the erection of the stone could be enforced."

The true doctrine is nowhere better stated than by Buckner, C., in Ross *v.* Duncan :[1] "The ground was taken that, as the negroes for whose benefit the trust was raised can maintain no suit in our courts to enforce it, and there being no one who can enforce it, the trust is void. The conclusion does not necessarily follow from the premises. A trust may be created which may be perfectly consistent with the law, and yet the law may have pointed out no mode of enforcement; still it would not interfere to prevent it, but would leave its execution to the voluntary action of the trustee. A person may convey his property upon what trust or condition he pleases, so that it be not against law; and the court would only interfere at the instance of the heirs or distributees of the grantor or testator when there had been a failure or refusal to perform the condition or trust."

Whether, then, Morice *v.* Bishop of Durham be considered from the point of view of principle, or in the light of the subsequent adverse decisions, it seems clear that Lord Eldon's opinion ought not to be followed unless by courts irrevocably bound by their own precedents. Unfortunately the New York Court of Appeals was thus hampered when the Tilden case came before it. In Holland *v.* Alcock,[2] the point had been taken, but without success, that the trustee, though not compellable to perform an honorary trust, should not be prevented from doing so. We must believe that no one of the numerous authorities in support of this position was brought to the attention of the court in that

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[1] Freem Ch. (Miss.) 587, 603.
[2] 108 N. Y. 312.

case, for Mr. Justice Rapallo made the surprising statement that the trustee's contention had never been sanctioned by any decision. Holland *v.* Alcock was followed in O'Connor *v.* Gifford[1] and Reed *v.* Williams.[2] Hence the subsequent failure of the "Tilden Trust."

J. B. Ames.

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[1] 117 N. Y. 275.
[2] 125 N. Y. 560.